Supreme Court, U.S.
FILED

94 673 OCT 12 1994

No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1994

ROBERT L. GUYER, as an individual
and Parent and Guardian, and
MATTHEW C. GUYER, a minor, and
BENJAMIN M. GUYER, a minor,

*Petitioners,*

v.

THE SCHOOL BOARD OF ALACHUA
COUNTY, FLORIDA and
FRANK J. LAGOTIC, Chairman,

*Respondents.*

## Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida

## PETITION FOR WRIT OF CERTIORARI

T.M. GUYER & FRIENDS, P.C.
THAD M. GUYER
Counsel of Record
221 West Main Street, Suite 1
Medford, OR 97501
(503) 773-9656

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31 pp

## QUESTION PRESENTED FOR REVIEW

MAY A PUBLIC ELEMENTARY SCHOOL, WITHOUT ANY INTENT TO PROMOTE RELIGION, KNOWINGLY PROMOTE CELEBRATION OF HALLOWEEN WITH THE USE OF RELIGIOUS SYMBOLS OFFENSIVE TO THE RELIGIOUS BELIEFS OF CHILDREN AND PARENTS, CONSISTENT WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT?

## PARTIES TO THE PROCEEDINGS BELOW

The names of all parties to the proceedings appear in the caption of the case.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

PARTIES TO PROCEEDINGS BELOW ..... ii

TABLE OF AUTHORITIES ..... iv

REPORTS AND OPINIONS BY OTHER COURTS AND AGENCIES ..... 1

GROUNDS FOR JURISDICTION ..... 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED ..... 1

First Amendment to the United States Constitution 1

CONCISE STATEMENT OF THE CASE ..... 2

Timely Raising of Federal Question Below ..... 2

Concise Statement of Material Facts ..... 2

ARGUMENT FOR ALLOWANCE OF THE WRIT ... 4

Summary of Grounds for Review ..... 4

Summary of Argument ..... 5

Argument ..... 6

CONCLUSION ..... 11

APPENDIX

Order on Summary Judgment of Trial Court ... App. 1

Opinion of Florida Court of Appeals ..... App. 4

Order Denying Review by Florida Supreme Court ..... App. 13

## TABLE OF AUTHORITIES

Page

CASES

*Allegheny County v. American Civil Liberties Union, Greater Pittsburg Chapter*, 492 U.S. 573, 106 L.Ed.2d 472, 109 S.Ct. 3086 (1989) .....App. 8

*Board of Ed. of Kiryas Joel v. Grumet*, 512 U.S. ___, 129 L.Ed.2d 546, 114 S.Ct. ___ (1994).....6, 10

*Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 37 L.Ed.2d 948, 93 S.Ct. 2955 (1973)..... 8

*Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir. 1980) .....7, 10

*Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. den.*, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992) .... 10

*Lamb's Chapel v. Center Moriches School Dist. et al.*, ___ U.S. ___, ___ L.Ed.2d ___, 113 S.Ct. 2141 (1993)..... 6

*Lee v. Weisman*, ___ U.S. ___, 120 L.Ed.2d 467, 112 S.Ct. 2649 (1992)..... 6, 7, 9

*Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971) .....4, 5, 6, 11

*Lynch v. Donnelly*, 465 U.S. 668, 79 L.Ed.2d 604, 104 S.Ct. 1355 (1984).....App. 10

*School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963) .....App. 11

*School District of Grand Rapids v. Ball*, 473 U.S. 373, 87 L.Ed.2d 267, 105 S.Ct. 3216 (1985) ..... 7

## TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

U.S. Const. Amend. I ..... 1

TREATIES

Tribe, L., *American Constitutional Law* (1978) ..... 8

## REPORTS AND OPINIONS BY OTHER COURTS AND AGENCIES

Other than the opinion of the Florida Court of Appeals dated April 7, 1994, which is set forth in the appendix, no other court or agency has entered any report or opinion in this matter. That opinion is reported as *Guyer v. School Bd. of Alachua County*, 634 So.2d 806 (Fla. App. 1st Dist. 1994).

## GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is the opinion of the Florida Court of Appeals dated April 7, 1994. On July 14, 1994, the Supreme Court of Florida entered its order denying review, which is a denial of discretionary review within the meaning of Rule 13.1 of this Court. This Court has jurisdiction to review the state court judgment by writ of certiorari pursuant to 28 USC section 1257(a).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

**United States Constitution:**

> Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * .

## CONCISE STATEMENT OF THE CASE

### Timely Raising of Federal Question Below:

The question now presented to this Court was timely raised, and thoroughly briefed, at all three state court levels. In the trial court, petitioner first raised the federal issue, which parallels the same issue under state law, by pretrial motion and memoranda of law. The federal issue was then timely presented on appeal to the Florida Court of Appeals, and finally to the Florida Supreme Court in a discretionary petition for review. The Respondent has at no time challenged the timeliness or adequacy of the raising of the federal issue.

### Concise Statement of Material Facts:

The opinion of the Florida Court of Appeals sets forth the judicial history, and majority of the relevant facts established in the record during summary judgment, or assumed as fact in the appellate process:

> This is an appeal from an order granting summary final judgment in favor of the Alachua County School Board, based on the court's determination as a matter of law that the use of popular symbols of Halloween in the public elementary school's Halloween festivities does not violate the Establishment Clauses of the Florida and U.S. constitutions. [App. 4] * * *
>
> Appellants took issue with the depiction of witches, cauldrons, and brooms included in decorations placed in the public elementary schools in Alachua County, as well as with teachers dressing up as witches in black dresses and

pointed hats, prior to and on October 31. As a result, appellant Robert Guyer kept his children out of Hidden Valley Elementary School on Halloween and subsequently sued to permanently enjoin the schools from including these depictions and costumes in future Halloween celebrations. [App. 5] * * *

The affidavits appellants submitted included statements of a cultural anthropology professor and others to the effect that "Wicca" is a variety of witchcraft and a religion, which has an increasing number of followers in recent times; some followers of "Wicca" consider Halloween a religious holiday; and witches wearing long black gowns, as well as cauldrons and brooms, are significant to followers of "Wicca." [App. 5]

Appellees submitted the affidavit of the principal of Hidden Valley Elementary School, who stated * * * these activities [and symbols] have been displayed in a secular and non-sectarian fashion and there has been no attempt to teach or promote wicca, satanism, witchcraft or any other form of religion; costumes and decorations simply serve to make Halloween a fun day for the students and serve an educational purpose by enriching the educational background and cultural awareness of the students. [App. 5-6] * * *

No evidence was offered to show that any one acted in furtherance of any religion and as such had any involvement whatsoever with the school Halloween celebration [as a religious activity], nor was there any argument to that effect. [App. 9]

We note that the symbols at issue here [are] * * * assumed to be religious symbols to

some for purposes of our discussion * * * . [App. 9]

In addition to these facts, the record is uncontroverted that the petitioners suffered significant religious offense from the Wiccan Halloween symbols. Prior to the filing of this action, hundreds of persons in the school district signed a petition requesting elimination of these symbols during the Halloween celebration. A public hearing was conducted to consider the request. After the litigation commenced, the school district narrowed, but refused to eliminate, the scope of the celebration's offensive aspects. From the outset, the school invited petitioners, and other children, to absent themselves from their regular classes and common areas to avoid the offense, and to relocate to a special room provided for that purpose.

## ARGUMENT FOR ALLOWANCE OF THE WRIT

**Summary of Grounds for Review:**

There is one primary ground upon which this petition is based. The Florida Court of Appeals' decision is one upon an important federal question which has been decided in a way which conflicts with the applicable decisions of this Court regarding Establishment Clause violations in public elementary schools. Additionally, this case presents a question as to the appropriateness of applying the *Lemon* tests to situations where government is offending, not endorsing or promoting, religion through the use of religious symbols.

**Summary of Argument:**

Petitioners urge that *outside* of the three part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a public elementary school's knowing use of offensive *religious* symbols, even for secular purposes and motives, violates the Establishment Clause absent clear evidence that the value of the secular benefits advanced outweigh the reasonably felt religious offense thereby inflicted on many children and their parents. Petitioners assert a First Amendment right to be free of intentional offense to their religious beliefs by school use of *religious* symbols, even when only motivated by secular purpose, unless the legitimate educational objectives sought are compelling, or in the alternative, clearly significant. If "secular purpose" or "effect" is a cognizable defense, that purpose or effect must have at least a credible significance.[1] The Florida courts erred in allowing summary judgment on a record in which the school board gave only vague and conclusory purposes of "fun", "community", "cultural awareness" and the unexplained "enriching [of] the educational background".

---

[1] For example, the overtly religious celebration of Christmas could hardly be allowed for the secular goals of school "fun" and "community", or for educating students in "cultural awareness" unless the record demonstrates that these goals are pursued to some credible degree within a tailored program. Nor should it make any difference if school officials in this scenario had only secular purpose in use of the overtly religious materials. Thus, a cartoon depiction of the Last Supper at Easter, posted on the walls with the Easter Bunny, would require some significant showing of secular purpose.

**Argument:**

Last term in *Board of Ed. of Kiryas Joel v. Grumet*, 512 U.S. ___, 129 L.Ed.2d 546, 114 S.Ct.___ (1994), this Court further refined its Establishment Clause jurisprudence within a discussion of what *Lemon v. Kurtzman, supra*, is not. A majority of the Court, on both sides of the judgment, agreed that *Lemon* should not or cannot provide the test, or even the analytical approach, for every Establishment Clause case. The First Amendment question in the present case has two parts: The first is whether the Establishment Clause can be violated where an elementary school *knowingly* promotes offensive religious symbolism *without* any intent or motive to benefit the religion which, in fact, *is* being promoted. And the second part is whether a school board should be required to balance the legitimate benefits of using the religious symbols with the religious offensiveness which the symbols inflict on young children and their parents. Resolution of this case need not be by application of the *Lemon* test.[2]

---

[2] The opinion below noted: "As a preliminary matter, appellants contend that the three part test set forth in *Lemon v. Kurtzman* [citation omitted], is no longer viable in analyzing Establishment Clause cases." (App. 7). Consistent with the concerns of members of the Court that practitioners and school boards need to know if *Lemon* is still alive, in appellant's brief *Lee v. Weisman* was given as the proof *Lemon* was dead. Then right before oral argument, *Lemon* was suddenly resurrected in *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141 (1993). Then, while the time to file this certiorari petition was running, *Lemon* was reduced to a ghost of itself in *Board of Ed. of Kiryas Joel*. Thus, while the appellant's brief originally argued the life of *Lemon*, at oral argument and in supplemental briefing appellants acknowledged and argued its death. Petitioner's

The Florida Court of Appeals expressly applied the *Lemon* test, resulting in the holding that the school board's conclusory secular purposes, and the vague "cultural context" of their pursuit, were sufficient as a matter of law to justify use of religious symbols offensive to petitioners. (App. 7). Although acknowledging that "particular care must be taken in cases involving impressionable school children",[3] the court held:

> Thus, the question in this case boils down to whether the principal or primary effect of the celebration, including depictions of the symbols appellants object to, is the endorsement or promotion of religion. We are firmly convinced that it is not.

(App. 9). The court gave no apparent weight to the offense to petitioner's religious values, yet noting that "people may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation". App. 11, citing *Lee v. Weisman, supra.* This Court has developed the "offense" factor very little in its holdings, but *Lee v. Weisman* indicated that the factor has an enlarged significance when the offended are public school students who must absent themselves from the school "community" to avoid the even momentary religious event. The religious event need not be the affirmative endorsement or promotion of

---

have now settled on a position that dead or alive, this case should be resolved without controlling reference to *Lemon*.

[3] Citing *School District of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

religion, for the promotion of nonreligious and non-adherents over the religious and adherents is unlawful. See, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973). Schools must maintain "neutrality", and when any level of non-neutrality engenders a corresponding offense to any students, the courts should weigh the school's secular objectives against the resulting offense. Hence, petitioner's urge a test which would disallow any significant offense to students from the school's knowing use of *religious* symbols absent strong secular justification. If the state has *no* credible secular justification, then no level of offense would be tolerated, even if the state lacks any religious motivations. See, Tribe, L., *American Constitutional Law*, pp. 836-37 (1978), arguing the decisive effect of "the absence of any secular purpose whatever." Gratuitous religious offense in the classroom by school authorities use of religious symbols would, *per se*, violate a student's First Amendment rights.

There is no credible secular purpose in the present record for the offensive symbols beyond the obvious: Celebrating Halloween is fun for most kids, and when the school itself organizes that fun, a sense of "community" is advanced. The school board made no effort in the record to elaborate any "educational" benefit advanced by the religious "Wiccan" symbols.[4] The school board made no effort in the record to dispute that petitioners, and hundreds like them who signed a petition, suffered

---

[4] Indeed, to teach the clearly religious origins of Halloween would present a tricky First Amendment task, at best, just as doing so with Christmas would.

grave religious offense in the celebration. Indeed, the school, in advance, invited offended children to leave their normal classes for alternative activities provided in a separate room. Thus, for petitioners, the celebration was not "fun", and their sense of "community" was one of alienation from it.

Halloween celebrations for most elementary school children are undoubtedly fun, and "happiness" is undoubtedly an atmosphere in which the young mind, if not the human spirit itself, thrives. The promotion of happiness, to avoid understatement of the Declaration of Independence, is a democratic ideal. But the pursuit of happiness in the public schools, as in all places, has its limits, and the need to avoid religious fun in the classroom is one of them. It is that limit which the respondent school district here has transgressed in the types of Halloween celebrations it allows during school time.[5] The government should demonstrate at least a significant gain when employing religious symbols which cause religious offense to those compelled to endure it.[6] When, as

---

[5] It is tempting to assume that the cultural history of Halloween celebration in the past 50 years endows its religious roots and manifestations with a legal *bona fides*. However, the Establishment Clause has never been held to accept "grandfathering" of certain religious practices. Indeed, the Court's most recent prayer case is the most definitive yet that deeply rooted public tradition must yield when its legal time is up. *Lee v. Weisman*, ___ U.S. ___, 120 L.Ed.2d 467, 112 S.Ct. 2649 (1992).

[6] This is a far different argument than assertions that government should refrain from *all* conduct which some find offensive to their religious beliefs. It is only religious conduct which is under attack in this case. In that respect, this case is different from one where religious values are offended by secular

in the present case, religious offense is so obvious that dissenting grade school kids are offered refuge only in isolating themselves, the argument may not be *ipso facto* won, but a serious constitutional issue is certainly raised.[7]

This Court is in the midst of a tumultuous transition in Establishment Clause jurisprudence. Pluralities and concurrences have been penned in substances and tones which elaborate the intense power which religion, even in its broadest conceptual casts, has over conscience and intellect. In *Board of Ed. of Kiryas Joel, supra,* Justice O'Connor observed that:

> Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.

*Id.*, at 129 L.Ed.2d 571. Petitioners urge that a different approach than the *Lemon* analysis be employed for religious offense cases where *both* significant secular purpose and official religious motivation are lacking.

---

instruction regarding sex education, abortion morality, or homosexuality.

[7] Schools are increasingly becoming sensitive to the religious nature of the Halloween celebration. See, *Florey v. Sioux Falls School Dist.*, 49-5, 619 F.2d 1311, 1320 (8th Cir. 1980), where Halloween is listed as a religious holiday by the public school. Local governments must be aware of the religious symbols in such passive presentations as their city seals. *See, Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401 (7th Cir. 1991), *cert. den.*, 112 S.Ct. 3054 (finding Establishment Clause violated by "Latin Cross" in official city emblem).

The significance of witches on broomsticks should not be cursorily rejected as the frivolous issue of the oversensitive parent and child. It is noteworthy that the Florida Court of Appeals chose to write and publish a significant opinion which treated petitioners' First Amendment claim with respect and dignity. Under the structure of *Lemon*, the Florida courts may be correct that the Wiccan symbols in the cultural context of Halloween "appear to be nothing more than a mere 'shadow', if that, in the realm of Establishment Clause jurisprudence". (App. 12). But that is a function not of the worth of the issues presented by petitioners, but of trying to apply *Lemon* to a kind of case for which, as a practical matter in this Court, it is no longer suited.

## CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Florida Court of Appeals should be reversed. The case should be remanded to determine if the school board has a compelling secular purpose in the use of religious Halloween symbols which outweighs the religious offense they cause.

Respectfully submitted,

THAD M. GUYER
*Attorney for Petitioner*

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA.
DIVISION J

ROBERT L. GUYER, as an individual and Parent and Guardian, Matthew C. Guyer, a minor, and Benjamin M. Guyer, a minor,

Plaintiff,

VS.

SCHOOL BOARD OF ALACHUA COUNTY, FRANK J. LAGOTIC, CHAIRMAN,

Defendant.

CASE NO. 90-3651-CA

---

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on for consideration pursuant to the Defendant's Motion for Summary Judgment. This Court having reviewed the record and having benefit of extensive research, argument and being fully advised, finds as follows:

The Plaintiff, ROBERT L. GUYER, in his individual capacity as well as parent and guardian of his two minor children, seeks to invoke the injunctive relief of this Court for his complaints concerning the Defendant's actions in observance and recognition of Halloween in the public schools of Alachua County. By the allowance of certain Halloween related activities, the Plaintiff's position is that the Defendant SCHOOL BOARD has violated his and his minor children's constitutional rights under

the Florida and United States Constitutions. The question presented to this Court is whether or not the undisputed facts in this case constitute the "establishment" of the Wicca religion in violation of the United States Constitution and the Constitution of the State of Florida? The undisputed facts clearly show that Defendant's employees have dressed as witches during school hours and have decorated public schools with depictions of witches and symbols customarily associated with Halloween activities. The popular symbols of Halloween, such as black cats, witches on broomsticks, pumpkins and witches stirring a pot, are secular in nature in our society and the celebration of Halloween and the use of these symbols in the public schools does not constitute the observance or establishment of a sacred festival in the Wicca religion.

The activities of the Defendant and its agents and employees as contained in the record of this case do not constitute unconstitutional establishment of religion in its observation of Halloween and the claim of the Plaintiff is without merit as a matter of law. The claim under Count One of the Complaint must also fail in that the undisputed facts demonstrate that the Plaintiff is not entitled to relief. Accordingly, it is

ORDERED AND ADJUDGED that the Defendant's Motion for Summary Judgment is hereby granted.

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida this 31st day of January, A. D. 1992.

/s/ Elzie S. Sanders
ELZIE S. SANDERS,
CIRCUIT JUDGE

IN THE DISTRICT
COURT OF APPEAL

FIRST DISTRICT,
STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-3669

ROBERT L. GUYER, as an Individual and Parent and Guardian, and MATTHEW C. GUYER, a minor, and BENJAMIN M. GUYER, a minor,

Appellants,

v.

THE SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA, and FRANK J. LAGOTIC, Chairman,

Appellees.

_____/

Opinion filed April 7, 1994.

An appeal from the Circuit Court for Alachua County. Elzie S. Sanders, Judge.

Thad M. Guyer, Medford, Oregon, for Appellants.

Francis H. Sheppard of Rumberger, Kirk, & Caldwell, Orlando, for Appellees.

JOANOS, J.

This is an appeal from an order granting summary final judgment in favor of the Alachua County School Board, based on the court's determination as a matter of law that the use of popular symbols of Halloween in the

public elementary school's Halloween festivities does not violate the establishment clauses of the Florida and U.S. constitutions. We affirm the trial court's ruling.

Appellants took issue with the depiction of witches, cauldrons, and brooms included in decorations placed in the public elementary schools in Alachua County, as well as with teachers dressing up as witches in black dresses and pointed hats, prior to and on October 31. As a result, appellant Robert Guyer kept his children out of Hidden Valley Elementary School on Halloween and subsequently sued to permanently enjoin the schools from including these depictions and costumes in future Halloween celebrations. Both parties submitted motions for summary judgment, each arguing to the trial court that there were no genuine issues of material fact and each contending they were entitled to summary judgment as a matter of law. Both appended supporting affidavits.

The affidavits appellants submitted included statements of a cultural anthropology professor and others to the effect that "Wicca" is a variety of witchcraft and a religion, which has an increasing number of followers in recent times; some followers of "Wicca" consider Halloween a religious holiday; and witches wearing long black gowns, as well as cauldrons and brooms, are significant to followers of "Wicca."

Appellees submitted the affidavit of the principal of Hidden Valley Elementary School, who stated that at the time in question, a number of teachers dressed in Halloween-related costumes, including a clown costume, a Ronald Reagan costume, and a witch costume; a member of the PTA put up a carnival poster which depicted a

Halloween witch stirring a pot; some classes hold storybook dress-up day, where the teacher dresses as a book character; on one occasion, a teacher dressed as the witch from *The Wizard of Oz*; the book *Streganona,* an award-winning fairy tale with a witch character, has been read in conjunction with the festivities; these activities have been displayed in a secular and non-sectarian fashion and there has been no attempt to teach or promote wicca, satanism, witchcraft or any form of religion; costumes and decorations simply serve to make Halloween a fun day for the students and serve an educational purpose by enriching the educational background and cultural awareness of the students.[1]

Appellees also submitted the affidavit of a professor of religion disputing that "the celebration of Halloween in the public schools constitutes either a sacred festival in the ritual calendar of the wiccan religion or a perpetuation of the religious life of the wiccan faith," or that popular Halloween symbols are symbols of "Wicca." He also asserted that the contemporary Halloween celebration is a secular event without religious connotations or activities, and a celebration of a cultural festival, which "is an important event in the life of society and serves to bring the community together," and does not result in the school board associating itself with any particular religion. The trial court concluded that the use of these symbols in the public schools does not constitute an establishment of religion.

---

[1] Included in the record is the school cafeteria calendar depicting a witch holding a wand, with the caption, "What's cooking?"

Appellants contend that the trial court erred in granting summary judgment without determining whether, in fact, the witch, cauldron, and broom are religious symbols, and in determining as a matter of law that there is no violation of the establishment clause. We find no error in the failure to specifically state whether these symbols have religious significance. There are no genuine issues of material fact left to be resolved in this case. Even assuming the symbols do have religious significance to some, there is no violation of the establishment clause in the public school celebration of Halloween.

As a preliminary matter, appellants contend that the three part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), is no longer viable in analyzing establishment clause cases. According to *Lemon*, in deciding whether a government practice violates the establishment clause, the court should determine "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). While the Supreme Court has "repeatedly emphasized our unwillingness to be confined to any single test or criterion," in evaluating establishment clause questions, *Lynch*, 465 U.S. at 679, recently the Court reaffirmed the viability of *Lemon* as a tool for analysis of these questions. *See Lamb's Chapel v. Center Moriches School District*, ___ U.S. ___, 113 S.Ct. 2141, 2148, 124 L.Ed.2d 352 (1993). In addition to the *Lemon* analysis, the Court has "paid particularly close attention to whether the challenged governmental practice either has

the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). The Court has also indicated that the setting, or context, in which a religious symbol is displayed is crucial in determining whether it violates the establishment clause. *See Allegheny County*, 492 U.S. at 598.

Appellants assert, and we recognize, that particular care must be taken in cases involving impressionable school children. *See School District of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), and *Smith v. Board of School Commissioner of Mobile County*, 827 F.2d 684, 689-90 (11th Cir. 1987):

> This special context is one which requires a sensitivity on the part of the court to both the broad discretion given school boards in choosing the public school curriculum, which mandates that courts not intervene in the resolution of conflicts arising in the daily operation of school systems unless basic constitutional values are 'directly and sharply implicate[d],' and the pervasive influence exercised by the public schools over the children who attend them, which makes scrupulous compliance with the establishment clause in the public schools particularly vital.

In the present case, there is no doubt that the Halloween festivities and decorations serve a secular purpose. According to the school principal, the costumes and decorations serve to make Halloween a fun day for students and serve an educational purpose by enriching their educational background and cultural awareness.

The record also reflects that this cultural celebration enhances a sense of community.[2] In addition, the Halloween festivities and decorations do not foster any excessive entanglement between government and religion. No evidence was offered to show that any one acted in furtherance of any religion and as such had any involvement whatsoever with the school Halloween celebration, nor was there any argument to that effect. Thus the question in this case boils down to whether the principal or primary effect of the celebration, including depictions of the symbols appellants object to, is the endorsement or promotion of religion. We are firmly convinced that it is not.

The determinative question is not whether the witch, cauldron, and broom are capable of communicating a religious message to some people. *See Allegheny County,* 492 U.S. at 598 ("[t]here is no doubt, of course, that the creche itself is capable of communicating a religious message"). What is determinative is the context in which these symbols are displayed. *Id.*

We note that the symbols at issue here, although assumed to be religious symbols to some for purposes of our discussion, are unlike a symbol such as a Latin cross,

---

[2] And *see for example, Fleischfresser v. Director of School District 200,* ___ F.3d ___ (7th Cir. 1994) 62 U.S.L.W. 2492 (Feb. 2, 1994), where, in a challenge to a series of elementary school readers on first amendment grounds, the court noted, in footnote 8, that the stories of witches were sequenced to coincide with a Halloween theme, and "[t]he American tradition of celebrating the eve of All Saints' Day is certainly a secular one."

because they are not "singularly" and "distinctively" religious, *see Lynch*, 465 U.S. at 694 (Justice Brennan dissenting), and *Harris v. City of Zion*, 927 F.2d 1401, 1403, 1412 (7th Cir. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 3054, 120 L.Ed.2d 920 (1992).[3] In addition, here the depictions of witches were displayed in combination with pumpkins and other typical symbols of Halloween that today signify nothing more than the secular celebration of a traditional cultural event. Witch costumes were worn along with clown and Ronald Reagan costumes as well as other dress-up costumes.[4] No religious ceremony of any kind is alleged to have taken place in conjunction with the festivities. Given the overall physical and cultural setting of the Halloween festivities, it is not "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their religious choices," *see School District of Grand Rapids*, 473 U.S. at 390, nor is there a "realistic danger that the community would think that the [school

---

[3] To the extent it is necessary to distinguish *Harris* from the instant case, due to appellant's contention that *Harris* requires us to find a violation of the establishment clause in this case, this is one distinguishing factor. Additional distinguishing factors are that the Latin cross was displayed (1) on the municipal seal (2) on a permanent, year round basis.

[4] As far as the teacher dressing as a witch is concerned, the cases appellants cite on religious garb indicate that for clothing to be symbolic of religion, " 'it must communicate the wearer's adherence to a particular religion.' " *See for example Cooper v. Eugene School District*, 723 P.2d 298 (Ore. 1986), *appeal dismissed*, 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987). In the present case, no one contends that the teacher wearing the witch costume did so to communicate her adherence to a particular religion.

board] was endorsing religion or any particular creed . . . ," *Lamb's Chapel,* 113 S.Ct. at 2148, even though some individuals may be offended by the display, *see Lee v. Weisman,* ___ U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) ("[p]eople may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation"). A government practice does not "violate the establishment clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' " *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 2689, 65 L.Ed.2d 784 (1980), *citing McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *see also Lynch,* 465 U.S. at 715 (Justice Brennan dissenting). In this case, as in *Fleischfresser v. Directors of School District 200,* ___ F.3d ___ (7th Cir. 1994) 62 U.S.L.W. 2492 (Feb. 2, 1994), "[a]ny religious references are secondary, if not trivial." By its participation in these Halloween festivities, the school board does not "send[ ] an unmistakable message that it supports and promotes" Wiccan beliefs. *Allegheny County,* 492 U.S. at 600.

"The Establishment Clause . . . primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *School District of Grand Rapids,* 473 U.S. at 381. We believe the Supreme Court's closing comments in *Lee v. Weisman, quoting Abington School District v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), are particularly appropriate here:

> **The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially**

> involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grown from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Witches, cauldrons, and brooms in the context of a school Halloween celebration appear to be nothing more than a mere "shadow", if that, in the realm of establishment cause jurisprudence.

AFFIRMED.

ZEHMER, C.J., and WEBSTER, J., CONCUR.

**SUPREME COURT OF FLORIDA**

THURSDAY, JULY 14, 1994

| | | |
|---|---|---|
| ROBERT L. GUYER, ETC., ET AL., | * | |
| Petitioners, | * | CASE NO. 83,666 |
| v. | * | DISTRICT COURT OF APPEAL, 1ST DISTRICT |
| THE SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA, ET AL., | * | NO. 92-3669 |
| Respondents. | * | |

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

GRIMES, C.J., SHAW, KOGAN, HARDING and WELLS, JJ., concur

A True Copy

TEST:

**Sid J. White**
**Clerk, Supreme Court**

**(SEAL)**

By: /s/ Betsy Hill
Deputy Clerk

BH

cc: Hon. Jon S. Wheeler, Clerk
Hon. J. K. "Buddy" Irby, Clerk
Hon. Elzie S. Sanders, Judge

Mr. Thad M. Guyer
Mr. Robert L. Guyer
Mr. Francis H. Sheppard
Mr. Richard A. Keller

No. 94-673

Supreme Court, U.S.
FILED
NOV 16 1994
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1994

ROBERT L. GUYER, as an individual and Parent and Guardian, and MATTHEW C. GUYER, a minor, and BENJAMIN M. GUYER, a minor,

*Petitioners,*

*vs.*

THE SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA and FRANK J. LAGOTIC, Chairman,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of the State of Florida*

## RESPONDENT'S BRIEF IN OPPOSITION

FRANCIS H. SHEPPARD
*Counsel of Record*
RUMBERGER, KIRK & CALDWELL
A Professional Association
*Attorneys for Respondent*
Signature Plaza, Suite 300
201 South Orange Avenue
P.O. Box 1873
Orlando, Florida 32802-1873
(407) 872-7300

5940
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

21 pp

## QUESTION PRESENTED FOR REVIEW

Does the use of popular symbols of Halloween in a public elementary school's secular Halloween festivities violate the Establishment Clause of the First Amendment to the United States Constitution?

## PARTIES TO THE PROCEEDING

The names of the Petitioners correctly appear in the caption of the case. However, Mr. Lagotic, named as a Respondent by the Petitioners, has not been Chairman of the School Board of Alachua County, Florida for several years and, therefore, is not correctly identified as a party to this action.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Question Presented for Review | i |
| Parties to the Proceeding | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Opinions Below | 2 |
| Statement of the Case | 2 |
| Summary of Argument | 4 |
| Reasons for Denying the Writ | 6 |
| I. The trial court and the Florida District Court of Appeal both correctly determined as a matter of law that the use of popular symbols of Halloween in the public elementary school's Halloween festivities does not violate the Establishment Clause of the First Amendment. | 6 |
| II. Petitioners' First Amendment claim fails under the alternative "coercion test" of *Lee v. Weisman*, __ U.S. __, 112 S. Ct. 2649 (1992). | 10 |
| III. The decision below is not in conflict with the decision of any other state or federal appellate court. | 11 |

*Contents*

*Page*

IV. There is no substantial case or controversy to be decided by this Court. ..... 14

Conclusion ..... 15

## TABLE OF CITATIONS

**Cases Cited:**

*Braxton v. United States*, 111 S. Ct. 1854 (1991) ..... 11

*Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994) .....5, 13, 14

*Fleischfresser v. Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994) .....5, 7, 8, 12

*Guyer v. The School Board of Alachua County, Florida*, 634 So. 2d 806 (Fla. 1st DCA 1994) ..... 2, 7, 9

*Lee v. Weisman*, __ U.S. __, 112 S. Ct. 2649 (1992) ..... 10, 11

*Lemon v. Kurtzman*, 403 U.S. 602 (1971) .....
.....4, 6, 7, 8, 9, 10, 12, 13, 15

*Lynch v. Donnelly*, 465 U.S. 668 (1984) .....7, 8, 9, 14

**Statute Cited:**

28 U.S.C. § 1983 ..... 2

*Contents*

*Page*

**United States Constitution Cited:**

First Amendment, Establishment Clause ..... i, 2, 4, 5, 6, 8, 10, 12, 13, 14, 15

**Rule Cited:**

Supreme Court Rule 10.1 ..... 11

**Other Authority Cited:**

Florida Administrative Procedures Act ..... 4, 11

No. 94-673

In The

# Supreme Court of the United States

October Term, 1994

ROBERT L. GUYER, as an individual and Parent and Guardian, and MATTHEW C. GUYER, a minor, and BENJAMIN M. GUYER, a minor,

*Petitioners,*

*vs.*

THE SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA and FRANK J. LOGOTIC, Chairman,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of the State of Florida*

## RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The School Board of Alachua County, Florida, respectfully submits this Brief in Opposition to Petitioners' Petition for Writ of Certiorari and respectfully requests this Court to deny the petition.

## OPINIONS BELOW

On cross motions for summary judgment, the Circuit Court for the Eighth Judicial Circuit, in and for Alachua County, Florida, entered an order granting Respondent's motion for summary judgment. The Florida First District Court of Appeal affirmed the trial court's summary judgment in a reported opinion. *Guyer v. The School Board of Alachua County, Florida*, 634 So. 2d 806 (Fla. 1st DCA 1994). The Supreme Court of Florida denied Petitioners' petition for review. Each of these decisions are reproduced in the Appendix to Guyer's Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Petitioners brought suit in state court pursuant to 28 U.S.C. § 1983 seeking to enjoin the use of popular symbols of Halloween in the public elementary schools in Alachua County during the Fall Halloween festivities in October 1988. Petitioners claimed that the Respondent was endorsing the alleged "Wiccan" religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. The trial court determined as a matter of law that the use of popular symbols of Halloween in the public elementary schools' Halloween festivities did not violate the Establishment Clause of either the Florida or the United States Constitutions. In affirming the trial court's judgment, the Florida appellate court, in addition to those matters noted in Petitioners' statement of the case, also referenced to the record as follows:

> Appellees submitted the affidavit of the principal of Hidden Valley Elementary School, who stated that at the time in question, a number of teachers dressed in Halloween-related costumes, including a

> clown costume, a Ronald Reagan costume, and a witch costume; a member of the PTA put up a carnival poster which depicted a Halloween witch stirring a pot; some classes hold storybook dress-up day, where the teacher dresses as a book character; on one occasion, a teacher dressed as the witch from *The Wizard of Oz*; the book *Streganona,* an award-winning fairy tale with a witch character, has been read in conjunction with the festivities; these activities have been displayed in a secular and non-sectarian fashion and there has been no attempt to teach or promote wicca, satanism, witchcraft or any form of religion; costumes and decorations simply serve to make Halloween a fun day for the students and serve an educational purpose by enriching the educational background and cultural awareness of the students.[1]

The Florida appellate court further noted that the depictions of witches which Petitioners found offensive were displayed in combination with pumpkins, Ronald Reagan costumes, clown costumes, and other typical symbols of Halloween that today signify nothing more than the secular celebration of a traditional cultural event. [Petitioners' Appendix 10.] Moreover, there was no religious ceremony, reenactment of rituals, or any religious connotation whatsoever to the Halloween festivities. Importantly, no evidence was ever offered to suggest that anyone acted in furtherance of any religion whatsoever. [Petitioners' Appendix 9.]

---

1. Included in the record is the school cafeteria calendar depicting a witch holding a wand, with the caption, "What's cooking?" [Petitioners' Appendix 5-6].

Finally, it should be noted that since this controversy was created by the Petitioners, the Respondent enacted a formal rule pursuant to the Florida Administrative Procedures Act designed to ensure that the recognition and observance of any religious holiday or the use of any symbols with potentially religious connotations is handled in a strictly neutral and secular fashion. Notwithstanding, Petitioner, Robert L. Guyer, withdrew his children from the public schools of Alachua County, Florida, and instead enrolled them in the Living Faith School, a school affiliated with the family's church.

## SUMMARY OF ARGUMENT

This Honorable Court should not grant certiorari in this case because the Florida courts correctly construed the Establishment Clause of the United States Constitution by applying the controlling precedent of this Court. While Petitioners urge that this is not an appropriate case for the application of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) test followed by the lower court, such an assertion is irrelevant because Petitioners' claim would fail under any alternative First Amendment test to be applied by this Court. Moreover, there is absolutely no conflict between the decision of the Florida appellate courts in this case and the decisions of any other state or federal courts which have considered the constitutionality of the use of Halloween related symbols and themes in the public schools. In fact, the Florida appellate court relied heavily on the *Fleischfresser v. Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994) decision in affirming the trial court's judgment in this case. The *Fleischfresser* decision has since been followed by the United States Court of Appeals for the Ninth Circuit in its recent opinion in *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994). Accordingly, not only is there no conflict to be resolved concerning the issue raised by the Petitioner in this case, there is an abiding unanimity of agreement among the courts which have considered the issue.

Ignoring this precedent, Petitioners now urge this Court to adopt instead a cost benefit analysis for determining the constitutionality of the use of Halloween related symbols in the public schools based upon Petitioners' subjective perception of religious offense. However, such a test would distort the First Amendment prohibition on the establishment of religion into a repealer of our national tradition of religious toleration. The First Amendment does not contemplate a vocal few being able to impose their views on the majority simply because of some subjective religious offense from objectively secular symbols or activities. Instead, as in this case when subjectively religious symbols are used as a part of an objectively secular activity or occurrence, no establishment or endorsement of religion has occurred and the First Amendment to the United States Constitution has not been infringed.

Accordingly, the Petition for Writ of Certiorari should be denied.

## REASONS FOR DENYING THE WRIT

### I.

### THE TRIAL COURT AND THE FLORIDA DISTRICT COURT OF APPEAL BOTH CORRECTLY DETERMINED AS A MATTER OF LAW THAT THE USE OF POPULAR SYMBOLS OF HALLOWEEN IN THE PUBLIC ELEMENTARY SCHOOL'S HALLOWEEN FESTIVITIES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The courts below followed the three-prong test established by this Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), in determining whether the contested activity in this case violated the Establishment Clause. Under the *Lemon* test, to satisfy the

Establishment Clause a government practice must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion. *Id.* at 613. While there has been significant discussion concerning the continuing viability of the *Lemon* test, this Court has never overruled *Lemon v. Kurtzman* and the lower court's adherence to *Lemon* was certainly not in error.

First, the Respondents' use of popular symbols of Halloween in the public elementary school clearly had a secular purpose. The Florida First District Court of Appeal stated:

> In the present case, there is no doubt that the Halloween festivities and decorations serve a secular purpose. According to the school principal, the costumes and decorations serve to make Halloween a fun day for students and serve an educational purpose by enriching their educational background and cultural awareness. The record also reflects that this cultural celebration enhances a sense of community.

*Guyer v. School Board Bd. of Alachua County,* 634 So. 2d 806, 808 (Fla. 1st DCA 1994).

In fact, in considering the first prong of the *Lemon* test, this Court "has invalidated legislation or governmental action on the grounds that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated *wholly by religious considerations.*" *Lynch v. Donnelly,* 465 U.S. 668, 678 (1984) (emphasis added). In *Lynch* this Court ultimately held that a nativity scene in the City of Pawtuckett, Rhode Island's Christmas display did not violate the

Establishment Clause of the United States Constitution. This Court stated: "The display is sponsored by the city to celebrate the holiday and to depict the origins of the holiday. These are legitimate secular purposes." *Id.* at 682. In the instant case, it can hardly be said that the actions of the Respondents in allowing teachers to dress up for Halloween or to decorate the schools with Halloween related seasonal decorations has a stronger religious purpose than the nativity scene allowed in *Lynch.*

Moreover, as the Florida District Court of Appeal noted in footnote 2 of its opinion, the Seventh Circuit Court of Appeals recently determined that Halloween is a secular holiday for purposes of the first prong of the *Lemon* test. *See, Fleischfresser v. Directors of School District 200,* 15 F.3d 680, 688 (7th Cir. 1994). In *Fleischfresser,* parents of elementary school children challenged a series of elementary school readers on First Amendment grounds because a few of the stories mentioned witches and goblins. *Id.* at 688. The Seventh Circuit noted:

> Many of the stories involving witches are sequenced to emphasize a Halloween theme. The American tradition of celebrating the Eve of All Saints' Day is certainly a secular one.

*Id.* at 688, n.8.

With respect to the second prong of the *Lemon* test, government action is proper if its primary effect is neither to advance nor inhibit religion. For government action to violate the second prong of the *Lemon* test, that action must amount to an endorsement of religion. *Lynch, supra,* 465 U.S. at 681; *Fleischfresser, supra,* 15 F.3d at 688. In this regard, the fact that some objects which have a secular and non-sectarian connotation to the vast majority of individuals in our society may have some arcane religious significance to others in the minority does not by

necessity mean that the rest of society is to be precluded from the use of these symbols in a secular and non-sectarian context in the public schools. *See, Lynch, supra,* 465 U.S. at 682. (the Establishment Clause is not violated because government action "happens to coincide or harmonize with the tenets of some . . . religions"); *Fleischfresser, supra,* 15 F.3d at 689. Significantly, in *Fleischfresser,* the court stated that the School District's use of witches and goblins in a series of elementary school readers did not violate the Establishment Clause just because these symbols happen to coincide with the tenents of some religions. 15 F.3d at 689.

In the instant case, the depictions of witches were displayed in combination with pumpkins and other typical symbols of Halloween and the festivities included other costumes such as clown costumes, Ronald Reagan costumes and other dress-up costumes. The Florida District Court of Appeal analyzed the second prong as follows:

> Thus the question in this case boils down to whether the principle or primary effect of the celebration, including depictions of the symbols appellants object to, is the endorsement or promotion of religion. We are firmly convinced that it is not.

*Guyer, supra,* 634 So. 2d 806, 808. The fact of the matter is there simply was no state endorsement of religion whatsoever.

Third, the Florida District Court of Appeal found that the conduct at issue did not violate the third prong of the *Lemon* test because: "the Halloween festivities and decorations do not foster any excessive entanglement between government and religion." *Id.* at 808. The only possible entanglement with religion that the Petitioners can complain of in this case is that controversy which

they themselves have created. This Court has made it clear that "[a] litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch, supra,* 465 U.S. at 685. Further, as the Florida District Court of Appeal stated:

> No evidence was offered to show that anyone acted in furtherance of any religion and as such had any involvement whatsoever with the school Halloween celebration, nor was there any argument to that effect.

*Guyer, supra,* 634 So. 2d 806, 808. Plainly, the court below correctly applied the *Lemon* test and accordingly, the Petition for Writ of Certiorari should be denied.

## II.

## PETITIONERS' FIRST AMENDMENT CLAIM FAILS UNDER THE ALTERNATIVE "COERCION TEST" OF *LEE V. WEISMAN,* __ U.S. __, 112 S. CT. 2649 (1992).

Petitioners have understandably had difficulty throughout the course of this litigation in dealing with the applicability of the *Lemon* test, and would now seek to have this Court formally declare *Lemon* simply a "ghost" of the past. However, this Court should not be spooked by this argument into granting certiorari in this case. Application of any other tests discussed by this Court in other Establishment Clause opinions would not affect the outcome in this case. The most frequently discussed "test" in the recent Establishment Clause cases appears to be the "coercion test" seemingly applied by this Court in *Lee v. Weisman,* 112 S. Ct. 2649 (1992). In *Lee,* this Court declined the opportunity to reconsider its decision in *Lemon* because the Court found there to

be coercion on the graduates to join in a formal religious exercise. *Id.* at 2655. Of course, the *Lee* coercion test would not be applicable to this case because there was no formal religious exercise or prayer of any sort and not even any suggestion that such occurred. On the other hand, in *Lee,* this Court found as follows:

> State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory. . . .

*Id.* at 2665.

In this case not only was the Respondent not associated with any formal religious exercise, there was no obligation on the part of Petitioner Robert L. Guyer's children to participate in the Halloween festivities. In fact, the record reflects that children whose parents for whatever reason, or the children themselves, who do not desire to participate in the festivities were allowed to go to the school media center for other activities. Moreover, the school board's formal administrative policy enacted pursuant to the Florida Administrative Procedures Act expressly provides that "[s]chool sponsored programs or activities shall be strictly neutral with respect to religion, neither favoring, disfavoring, approving, disapproving, endorsing, nor opposing religion in general or any particular religion. Students and staff members shall be excused from participating in school activities which are contrary to their religious beliefs." Accordingly, applying the analysis used in *Lee v. Weisman, supra,* would not alter the result in this case and the Petition for Certiorari should therefore be denied.

## III.

## THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER STATE OR FEDERAL APPELLATE COURT.

A principle purpose for which this Court historically uses its certiorari jurisdiction is to resolve conflicts among the circuit courts of appeal and state courts concerning the meaning of provisions of federal law. *See Braxton v. United States,* 111 S. Ct. 1854, 1857 (1991); Sup. Ct. R. 10.1. However, in this case, there is absolutely no conflict between the decision of the Florida First District Court of Appeal and any other state or federal appellate court of which the parties are aware. In fact, Petitioners have not even urged that such a conflict exists or that such a conflict might be a basis for granting certiorari in this case. The obvious reason for Petitioners' omission in this regard is that other reported decisions addressing the use of Halloween symbols in the public schools are in concurrence with the decision of the Florida appellate court in this case.

In *Fleishfresser v. Directors of School District 200,* 15 F.3d 680 (7th Cir. 1994), the court was confronted with a First Amendment claim concerning the use of the *Impressions* reading series in a public school curriculum. The reading series allegedly included references to supernatural beings including "wizards, sorcerers, giants and unspecified creatures with supernatural powers". *Fleischfresser* at 683. Many of the stories in the reading series included works that involve fantasy and make-believe to a significant degree. Significantly, the reading series relied on witches and goblins in a few stories and many of the stories involving witches were sequenced to emphasize a Halloween theme. The parents in *Fleischfresser* objected to the inclusion of these works in the curriculum contending, as Petitioners in this case, that the inclusion of these works represents the impermissible establishment of a pagan religion in the schools.

The *Fleischfresser* court found that there was no violation of the First Amendment. As in this case, the *Fleischfresser* court was doubtful that there was any establishment of religion at all. However, the court proceeded to analyze the use of the *Impressions* reading series in the public schools within the framework of the *Lemon v. Kurtzman* test. As in this case, the Seventh Circuit found that the use of make-believe and fantasy, including the use of a few witches and goblins in the stories, served a secular purpose. In fact, at footnote 8 of its opinion at page 688, the court specifically noted that "[t]he American tradition of celebrating the eve of All Saints's Day is certainly a secular one."

Similarly, the *Fleischfresser* court found that the second prong of the *Lemon* test had not been offended by the use of the series because the principle or primary effect of its use was not to endorse religion. Not only were there references in the reading series to witches and Halloween themes, there were references to Christian and Protestant holidays as well. Finally, the court found that the third prong of the *Lemon* test had not been violated since there was no governmental entanglement with religion. Of course, the record in this case is devoid of any such governmental entanglement with religion as well.

This same reading series again came under constitutional attack in *Brown v. Woodland Joint Unified School District,* 27 F.3d 1373 (9th Cir. 1994). The parents in the *Brown* case contended that a number of these stories required children to practice the "religion" of witchcraft in violation of the Establishment Clause of the United States Constitution. Like the Petitioners in this case, the Browns contended that certain selections in the series promoted the practice of Wicca. A little more amplification concerning the content of the series is provided in the *Brown* decision and it is pointed out in that case that the challenged selections asked children to discuss witches

or to create poetic chants. In fact, some selections asked students to pretend that they are witches or sorcerers and asked them to role play the characters in certain situations. Plainly, these exercises noted in the record of the *Brown* case go far beyond any activities of which Petitioners complain in the instant case. However, the United States Court of Appeals for the Ninth Circuit applied the *Lemon* test to the Browns' claim and determined that there was no violation of the Establishment Clause in that case.

The *Brown* court noted that the relevant inquiry "is whether the government's action actually conveys a message of endorsement of religion in general or of a particular religion." *Brown*, at 1378. Interestingly enough, in answering this question the court considered at length the very issue urged upon this Court by Petitioners. Specifically, the Browns urged, as do Petitioners, that their subjective perception that a state action disapproves of or is hostile towards one's religion is determinative for purposes of First Amendment analysis. Instead, the Ninth Circuit concluded that the appropriate standard is whether an objectively reasonable observer in Petitioners' position would believe there to be an endorsement of religion. The *Brown* court concluded that neither the references to witches and goblins or the fantasy exercises caused students to reasonably believe that they were participating in religious ritual and, therefore, did not offend the Establishment Clause.

Moreover, the Browns urged, like Petitioners in this case, that the use of allegedly religious symbols be weighed against its secular purpose and argued that the unnecessary use of religious symbols or rituals was unconstitutional. The Ninth Circuit Court of Appeals concluded, however, that as long as there is a secular means being used, the state is not required to use an alternative secular means that is less likely to be associated with religion. This proposition appears to be a recurring theme in this Court's

First Amendment jurisprudence. *See Lynch v. Donnelly,* 465 U.S. 668 (1984). To now suddenly require state officials to weigh the secular purpose in a particular activity against the subjective offense of various citizens groups would not only turn First Amendment case law on its head, it would place the state in the very role of making religious judgment calls which the First Amendment certainly prohibits.

## IV.

## THERE IS NO SUBSTANTIAL CASE OR CONTROVERSY TO BE DECIDED BY THIS COURT.

Finally, as noted by Petitioners, the Respondent has taken action to minimize any potential subjective religious offense which Petitioners, or others similarly situated, might sustain as a result of the use of Halloween related symbols and other seasonal festivities. Both the Respondent's policy at the time in question, as well as the formal administrative policy adopted by Respondent, clearly avoid the endorsement of religion and are carefully tailored to accommodate religious diversity. Nothing more is required by the First Amendment. Moreover, Petitioner Robert L. Guyer's children are no longer enrolled in the public schools of Alachua County, Florida and thus there is no substantial case or controversy for this Court to decide. As the Florida First District Court of Appeal noted, "[w]itches, cauldrons, and brooms in the context of a school Halloween celebration appear to be nothing more than a mere 'shadow', if that, in the realm of Establishment Clause jurisprudence." This Court need not bother itself ruminating about the ghost of *Lemon,* or any other perceived specters in the shadows of First Amendment jurisprudence, simply to alleviate the subjective concerns of an overly sensitive parent and his children.

## CONCLUSION

Accordingly, for the foregoing reasons, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS H. SHEPPARD
*Counsel of Record*
RUMBERGER, KIRK & CALDWELL
A Professional Association
*Attorneys for Respondent*
Signature Plaza, Suite 300
201 South Orange Avenue
P.O. Box 1873
Orlando, Florida 32802-1873
(407) 872-7300